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Teo Soon Kiat & Anor v Public Prosecutor

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HIGH COURT (LIMBANG) — CRIMINAL APPEAL NO LMN-41–1/11 OF 2017
ALWI ABDUL WAHAB JC
13 DECEMBER 2017

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Criminal Procedure — Stay of execution — Application for — Applicants convicted and sentenced to fine of RM100,000 in default of 12 months imprisonment — Applicants unable to pay fine and subsequently detained for such failure — Whether fine could be paid in instalments — Whether stay ought to be allowed

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In the present application, the applicants applied for an order to stay the sentence of a fine of RM100,000 in default 12 months imprisonment imposed by the magistrate's court. The applicants were not able to pay the fine and were detained in default of paying the fine. The applicants submitted that; (a) in considering whether the stay ought to be granted or otherwise, there are certain factors to be considered which are by no means exhaustive; and (b) if the hearing of the appeal is to take a few months to be heard, then it would have defeated the purpose of this appeal as default sentence runs with immediate effect for 12 months period. The prosecution argued that the stay should not be allowed unless the fine was paid by the applicants.

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Held, allowing the applicants application:

(1) The court disagreed with the prosecution's contention that the stay could only be given if the fine was paid in full or by way of instalments pending appeal. There was no instalment scheme offered to the applicants under s 283(1)(b)(ii) of the Criminal Procedure Code ('the CPC') either by the court or by the prosecution. Section 283 of the CPC provides for the manner on how the fine is to be paid in the absence of any express provision under any law for the time being in force in respect of any fine imposed under such law. It did not actually provide that the payment of fine must be paid before the stay of execution was allowed. The application for stay serves no purpose if the applicants were ordered to pay the fine pending the appeal (see para 9).

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(2) As the length of time to hear the appeal may take few months from now, the appeal, if allowed would be rendered nugatory since the applicants would have already served a certain period of imprisonment. Based on the forgoing reasons, the applicants notice of motion ought to be allowed (see para 10).

I

[Bahasa Malaysia summary

Dalam permohonan ini, pemohon memohon perintah untuk menggantung hukuman denda sebanyak RM100,000 jika gagal, penjara 12 bulan, yang dijatuhkan oleh mahkamah majistret. Pemohon tidak mampu membayar denda dan ditahan kerana gagal membayar denda. Pemohon mengemukakan bahawa; (a) dalam mempertimbangkan sama ada penggantungan sepatutnya diberikan atau tidak, terdapat faktor-faktor tertentu yang perlu dipertimbangkan yang tidak lengkap; dan (b) jika perbicaraan rayuan akan mengambil masa beberapa bulan untuk didengar, maka ia akan menewaskan matlamat rayuan ini kerana hukuman ini berkuatkuasa serta-merta bagi tempoh 12 bulan. Pihak pendakwaan menghujahkan bahawa penggantungan tidak boleh dibenarkan melainkan denda telah dibayar oleh pemohon.

Diputuskan, membenarkan permohonan pemohon:

(1) Mahkamah tidak bersetuju dengan hujahan pihak pendakwaan bahawa penangguhan hanya akan diberikan jika denda telah dibayar sepenuhnya atau dengan cara ansuran yang belum selesai. Tiada skim ansuran yang ditawarkan kepada pemohon di bawah s 283(1)(b)(ii) Kanun Tatacara Jenayah ('KTJ') sama ada oleh mahkamah atau oleh pendakwaan. Seksyen 283 KTJ memperuntukkan cara bagaimana denda akan dibayar tanpa ketetapan apa-apa peruntukan nyata bawah mana-mana undang-undang yang sedang berkuatkuasa berkenaan dengan apa-apa denda yang dikenakan bawah undang-undang. Ia sebenarnya tidak memperuntukkan bahawa bayaran denda mesti dibayar sebelum penangguhan pelaksanaan dibenarkan. Permohonan penangguhan tidak ada matlamat jika pemohon diperintahkan membayar denda sementara menunggu rayuan. (lihat perenggan 9).

(2) Memandangkan tempoh masa mendengar rayuan mungkin mengambil masa beberapa bulan dari sekarang, rayuan, jika dibenarkan adalah tidak berguna kerana pemohon akan menjalaninya dalam tempoh tertentu pemenjaraan. Berdasarkan sebab-sebab yang tidak diingini, notis usul pemohon patut dibenarkan (lihat perenggan 10).]

Notes

For cases on stay of execution, see 5(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5339–5346.

Cases referred to

Dato' Seri Anwar Ibrahim v PP [2004] 1 MLJ 497; [2004] 1 CLJ 592, CA (refd)

Khairuddin Abdul Majid v PP [2006] 1 LNS 280, HC (distd)

Legislation referred to

Criminal Procedure Code ss 283, 283(1)(b), (1)(b)(ii), 311

Francis Wee (Francis Wee & Partners Advocates) for the applicants.
Wan Mohd I'zzat bin Wan Abdullah (Deputy Public Prosecutor, Sarawak State Attorney General's Chambers) for the respondent.

Alwi Abdul Wahab JC:

[1] By way of notice of motion both the applicants applied for an order to stay the sentence of a fine of RM100,000 in default 12 months imprisonment imposed by the learned magistrate at Limbang Magistrates Court on 29 November 2017.

[2] The motion is supported by the affidavit of Mr Francis Wee affirmed on 6 December 2017. Both the applicants have filed their appeal against the sentence on 30 November 2017. Both the applicants were not able to pay the fine as a result of which they being detained in default of paying the fine.

[3] The learned counsel for the applicants submitted that there are special circumstances for the stay of execution as both applicants were unrepresented at the defence stage when the court rejected Mr Francis' application for an adjournment as he was having another matter in Kuching on the same date. As both the applicants were unrepresented, they chose to remain silent when they were called to enter their defence despite that they were represented throughout the prosecution's case. Both applicants were then convicted and sentenced to a fine of RM100,000 in default of 12 months imprisonment accordingly.

[4] It was argued by the counsel for the applicants, in considering whether the stay ought to be granted or otherwise, there are certain factors to be considered which are by no means exhaustive (*Dato' Seri Anwar Ibrahim v Public Prosecutor* [2004] 1 MLJ 497; [2004] 1 CLJ 592). One of the factors to be considered by the court is that the length of the terms of the imprisonment in comparison with the length of the time which is likely to be taken for the appeal to be heard.

[5] It was further submitted that if the hearing of the appeal is to take a few months to be heard, then it would have defeated the purpose of this appeal as default sentence runs with immediate effect for 12 months period. The learned DPP despite tendering his written submissions on the eve of the hearing of this notice of motion applied for this matter to be adjourned to February 2018 to allow for the customs DPP to appear in person.

[6] I proceeded to hear this motion since both parties have prepared and filed their submissions notwithstanding the fact that submissions were filed late. In the learned DPP's submissions, he submitted that pursuant to s 283 of the Criminal Procedure Code ('the CPC') and the case authority of *Khairuddin Abdul Majid v Public Prosecutor* [2006] 1 LNS 280, the stay shall not be allowed unless the fine is paid by the applicants. Hence, the applicants should be ordered to pay the fine in full or by way of instalments.

[7] Having read s 283 of the CPC and the case law cited by the learned DPP, with respect, I disagree with the learned DPP's contention that the stay can only be given if the fine is paid in full or by way of instalments pending appeal. *Khairuddin*'s case cited by the DPP can be distinguished with the present case. In *Khairuddin*'s case, the sentence of fine handed down by the sessions court was allowed to be stayed by the learned sessions court judge pending appeal. The stay in the sessions court therein was allowed despite the suggestion by the prosecution to the court for the fine to be paid by way of instalments pursuant to s 283(1)(b) of the CPC. Dissatisfied with the order of stay given by the learned sessions court judge, the DPP crossed appeal to the High Court. The High Court having heard the DPP's appeal allowed it and ordered that the fine to be paid by the appellant therein by six months instalments.

[8] In the present case, there was no instalment scheme offered to the applicants under s 283(1)(b)(ii) of the CPC either by the court or by the prosecution. The appellants have no option but to pay in full otherwise they have to serve the default sentence. *Khairuddin*'s case is not, in my view, the authority to say that the stay of execution of fine cannot be allowed unless the sentence of fine is paid.

[9] In my view, the application for stay serves no purpose if the applicants were to be ordered to pay the fine pending the appeal. I am also of the view that s 283 of the CPC provides for the manner how the fine is to be paid in the absence of any express provision under any law for the time being in force in respect of any fine imposed under such law. It does not actually provide that the payment of fine must be paid before the stay of execution is allowed.

[10] In my view, s 311 of the CPC is a special provision to stay execution on any judgment, order, conviction or sentence pending appeal. Here, the stay application is in respect of the sentence of fine on the ground that the applicants were not able to pay the fine, therefore, served the default sentence of 12 months imprisonment. As the length of time to hear the appeal may take few months from now, the appeal, if allowed would be rendered nugatory since the applicants would have already served certain period of an imprisonment.

[11] In the present case, there is merit in the appeal in regards to the issue of

non-representation of both applicants at the defence stage when there were legally represented throughout the prosecution's stage.

[12] Based on the forgoing reasons, I allowed the applicant's notice of motion to stay the execution of fine. I ordered both the applicants to be released on cash bail of RM5,000 each and both applicants are also ordered to produce one surety each.

Applicant's application allowed.

Reported by Afiq Mohamad Noor